UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

LUTHER PETE HAYNES, Petitioner-Appellant, v. DEAN BORDERS, Warden, Respondent-Appellee.	No. 19-56139 D.C. No. 8:19-cv-00640-JGB-PLA Central District of California, Santa Ana ORDER

Before: THOMAS, Chief Judge, and BRESS, Circuit Judge.

Appellant's motion for certificate of appealability (Docket Entry No. 21) is construed as a motion for reconsideration, and is denied. *See* 9th Cir. R. 27-10.

Appellant's motion for leave to file "oversized handwritten document" and motion for reconsideration (Docket Entry No. 22) are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

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LUTHER PETE HAYNES, Petitioner-Appellant, v. DEAN BORDERS, Warden, Respondent-Appellee.	No. 19-56139 D.C. No. 8:19-cv-00640-JGB-PLA Central District of California, Santa Ana ORDER

Before: BYBEE and HURWITZ, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability (Docket Entry Nos. 9, 10, 11, 15, 16, 18, 19) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

LUTHER PETE HAYNES, Petitioner, v. DEAN BORDERS, Warden, Respondent.	No. SA CV 19-640-JBG (PLA) **ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

On July 3, 2019, the United States Magistrate Judge issued a Report and Recommendation ("Report"), recommending that petitioner's Petition for Writ of Habeas Corpus be denied and that this action be dismissed with prejudice. (Docket No. 22). On August 14, 2019, petitioner filed objections to the Report. (Docket No. 28).

The Report adequately addresses most of the issues raised in petitioner's Objections. A few of those issues, however, warrant further discussion. The bulk of petitioner's Objections are directed at the California Court of Appeal's factual findings. (See, e.g., Docket No. 28 at 4-6, 9-21, 31-32, 34-40). In particular, petitioner maintains that those findings are incorrect, and, therefore, the Magistrate Judge erred in adopting and relying upon them. But, for the most part, petitioner does not identify any true inaccuracies in the court of appeal's recitation of the facts; instead, he purports to identify conflicting evidence in the record (or outside of the record) that,

if believed, would support a view of the facts that is more favorable to petitioner than that presented by the court of appeal. None of that evidence, however, disproves any factual finding by the court of appeal. As such, there is no merit to petitioner's objection.

Moreover, although petitioner cites a few examples of what he believes to be true factual inaccuracies in the court of appeal's opinion, the purported inaccuracies that he identifies are not material to any of his grounds for relief. For example, he maintains that, contrary to the court of appeal's findings, the victim's mother, in fact, provided police with copies of photographs that were taken at the pool party where the conduct underlying petitioner's conviction occurred. (Docket No. 28 at 13). Presumably, petitioner believes that this alleged fact supports his claim that the more than nineteen-year delay between his criminal conduct and his arrest (and the supposed misconduct by law enforcement in losing the photographs) violated his right to due process. However, as noted in the Report, the photographs were inconsequential because the undisputed evidence at trial established that the photographs depicted nothing improper. (Docket No. 22 at 21). Thus, regardless of whether the photographs were turned over to police, petitioner suffered no prejudice from their disappearance.[1]

The only material factual errors that petitioner purports to identify are those set forth in the Orange County Superior Court's opinion (Docket No. 14-29) pertaining to the supposed fraudulent or invalid arrest warrant pursuant to which petitioner ultimately was arrested. (See Docket No. 28 at 57-59). But as explained in the Report, petitioner's allegations with respect to the arrest warrant are meritless because he can show no fraud on the part of law enforcement, the

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[1] To the extent that petitioner believes that any of the supposed inaccurate facts that he has identified support his actual innocence claim, he is mistaken. At most, he has attempted to cast doubt on the victim's account of petitioner's misconduct by noting inconsistencies in her account and a lack of physical evidence implicating petitioner in the charged crime. Petitioner has not, however, presented any evidence showing that the victim's testimony was implausible or that someone else committed the charged crime. Nor has petitioner presented any evidence -- forensic or otherwise -- that would preclude him from having committed the crimes of which he was accused. Accordingly, even accepting his view of the facts, petitioner has not met the extraordinarily high standard to succeed on his freestanding actual innocence claim, assuming such a claim is, in fact, cognizable on federal habeas review. Compare with House v. Bell, 547 U.S. 518, 553-55, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006); Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc).

prosecutor, or the trial court. (See Docket No 22 at 31-33, 37). Indeed, his challenges to the arrest warrant are premised on his contention that, in 1995, he was charged with a misdemeanor, rather than with a felony. But, as explained in the Report, the record is clear that, in 1995, he was charged with a felony, not a misdemeanor. (See id. at 33 ("[T]he 1995 complaint and arrest warrant both show that [petitioner] had been charged with a felony. What is more, the complaint also alleged that petitioner had previously been convicted of two prior felonies. Given this record, petitioner has not shown that the felony complaint against him was falsified or improper."); see also Docket No. 14-7 at 9 (1995 complaint alleging that "[o]n or about January 14, 1995, [petitioner], in violation of Section 647.6 of the Penal Code (FELONY CHILD MOLESTING -- WITH PRIOR), a FELONY, did willfully and unlawfully annoy and molest . . . ERIN B., a child under the age of eighteen (18) years").

Petitioner also maintains that the Magistrate Judge erred in analyzing petitioner's prosecutorial misconduct ground for relief. (See, e.g., Docket No. 28 at 3-4, 57.) Specifically, petitioner faults the Magistrate Judge for construing petitioner's claim as one of vindictive prosecution, when, in fact, petitioner alleged a claim that the prosecutor committed fraud upon the trial court.[2] (See id.). According to petitioner, the prosecutor committed fraud by "hid[ing]" evidence of petitioner's extradition, by "manipulat[ing]" the trial court's minute orders, by "alter[ing]" the complaint and arrest warrant that were originally filed against petitioner, and by "misstat[ing] and misconstru[ing]" evidence in order to prejudice the trial court against petitioner. (Docket No. 28 at 57; see also id. at 61-68). This objection is not well-taken. Regardless of how petitioner styles his claim, the thrust of his claim is the same -- that the prosecutor pursued a felony charge against petitioner even though the prosecutor knew that, in 1995, the crime had been charged as (and could only have been charged as) a misdemeanor. However, as explained in the Report, that claim is meritless because the 1995 complaint and arrest warrant both show that, in 1995,

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[2] In a separate objection, petitioner faults the Magistrate Judge for "renaming [petitioner's] claim of factual innocence to actual innocence. . . ." (Docket No. 28 at 74). However, in this regard, petitioner -- at most -- identifies a distinction without a difference. To the extent that petitioner believes that claims of "factual innocence" and "actual innocence" are governed by different legal standards, he is mistaken.

petitioner was charged with a felony. (See supra). Thus, the prosecutor committed no misconduct in prosecuting petitioner for committing a felony.

Finally, citing the allegedly fraudulent arrest warrant, petitioner argues that the state law criminal charge against him was untimely filed because the time in which to prosecute a misdemeanor had long-since expired before his arrest. (Docket No. 28 at 57, 61-68). But as discussed above, petitioner's allegations of fraud are meritless. Moreover, the timeliness of the criminal charge is a state law issue, and the state court resolved that issue against petitioner. (See Docket No. 14-30 at 8). This Court is bound by the court of appeal's interpretation of California law. See Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (per curiam) (stating that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); Himes v. Thompson, 336 F.3d 848, 852 (9th Cir. 2003) ("We are bound by a state's interpretation of its own laws.").

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CONCLUSION

Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file records herein, the Magistrate Judge's Report and Recommendation, and petitioner's objections to the Report and Recommendation. The Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

ACCORDINGLY, IT IS ORDERED:

1. The Report and Recommendation is accepted.
2. Judgment shall be entered consistent with this Order.
3. The clerk shall serve this Order and the Judgment on all counsel or parties of record.

DATED: August 30, 2019

HONORABLE JESUS G. BERNAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

LUTHER PETE HAYNES,

Petitioner,

v.

DEAN BORDERS, Warden,

Respondent.

No. SA CV 19-640-JGB (PLA)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Jesus G. Bernal, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

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I

PROCEDURAL HISTORY

In 2015, an Orange County Superior Court jury convicted petitioner of felony child molestation. (See Docket No. 14-16 at 2).[1] The trial court subsequently found that petitioner had suffered two prior convictions for lewd and lascivious conduct with children under the age of fourteen and that both crimes were serious or violent felonies for purposes of California's Three Strikes Law. (Id.). Petitioner was then sentenced to twenty-five years to life in state prison. (Id.).

Petitioner appealed. (See Docket No. 14-13). On April 3, 2017, the California Court of Appeal affirmed the judgment. (Docket No. 14-16). Petitioner then filed a petition for review in the California Supreme Court, which was summarily denied on July 19, 2017. (Docket Nos. 14-17, 14-18).

Petitioner then filed a petition for writ of habeas corpus in the Orange County Superior Court (Docket No. 14-19), in which he alleged that a California law precluding early parole consideration for non-violent sex offenders was invalid. (See id.). The superior court granted relief and ordered the California Department of Corrections and Rehabilitation to evaluate petitioner for early parole consideration. (Docket No. 14-26).

Petitioner then filed a second petition for writ of habeas corpus in the Orange County Superior Court (Docket No. 14-29), where he raised a number of challenges to his conviction and sentence. (See id.). On May 3, 2018, the superior court denied the petition in a reasoned opinion. (Docket No. 14-30). Next, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, which was summarily denied. (Docket Nos. 14-31, 14-32, 14-33).

Finally, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which was denied without comment. (See Docket Nos. 14-34, 14-38).

Petitioner then initiated this action. (Docket No. 1). On April 29, 2019, respondent filed an Answer and a supporting Memorandum of Points and Authorities ("Answer"). (Docket No. 13).

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[1] Any reference in this Report to page numbers of the parties' filings or lodgments corresponds to the sequential page number of the electronic copy that was filed in this Court.

On May 30, 2019, petitioner filed a Reply. (Docket No. 18). The Court then granted petitioner's request to supplement his reply. (Docket Nos. 19-20).

This matter is deemed submitted and is ready for a decision.

II

STATEMENT OF FACTS

The Court adopts the factual summary set forth in the California Court of Appeal's Opinion affirming petitioner's conviction.[2]

> E.B.'s mother hosted a pool party at her apartment complex for her coworkers from a paleontology firm, including [petitioner]. E.B. was 11 years old at the time, and [petitioner] exposed his penis and testicles to her in the pool. He had been swimming close to her and taking pictures of her with a disposable camera. He approached her from the deep end of the pool when she was in the shallow end. She exited the pool, but he handed her the camera and directed her to take a picture of him. As she went to take the picture, she noticed he had pulled down his swim trunks. The water was just above his waist, but she could clearly see his genitals. She was upset and surprised, but she did as she was told, pressing the button to take the picture, and she then hurried over to the hot tub area near where her mother was sitting. At some point, she gave the camera to her mother wanting her to hide it, but she did not say anything about what had happened because she was embarrassed and other guests were present. [Petitioner] managed to retrieve the camera before he left.
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> It was not the first time he had exposed himself to E.B. A few weeks or months earlier, E.B. had been sitting at a desk near her mother's bedroom in their apartment while [petitioner] was visiting. She looked up and saw [petitioner] in her mother's room. The door was open and he was facing her with his pants down, exposing his genitals. He maintained eye contact with her, but she told herself the exposure was not "necessarily intentional" and maybe he had simply forgotten to close the door while changing. So she rolled her eyes, "scoffed," and went to join others in the apartment, but did not tell anyone.
>
> But she was certain [petitioner] deliberately exposed himself to her at the pool and told her mother the next day on January 15, 1995.
>
> Her mother (Mary A.) knew where [petitioner] had photographs developed for the paleontology firm and tried to persuade the shop owner to let her see any

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[2] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (citations omitted); 28 U.S.C. § 2254(e)(1). Because petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. Tilcock, 538 F.3d at 1141. To the extent that an evaluation of petitioner's individual claims depends on an examination of the trial record, the Court herein has made an independent evaluation of the record specific to those claims.

pictures from rolls of film [petitioner] had recently dropped off. It is not clear whether she told the owner why she wanted to see the photographs. In any event, he refused because [petitioner] had submitted the film under his employer's account.

On January 17, 1995, Mary called the employer, John Minch, "briefly explained" what had happened, and asked him to retrieve the photographs. Minch assented and invited her to meet him to view the photos. According to Mary, by the time she arrived, he had already "separated . . . out" the pool party pictures from other pictures, including fossil photographs. But she saw nothing inappropriate in any of the pictures; in fact, they were all "pretty blurry" and appeared to have been taken underwater for the most part.FN.1. None depicted anything inappropriate; none showed [petitioner] or anyone exposing their genitals or engaging in any other sexual conduct.

FN.1 E.B. testified she did not think the camera was capable of underwater pictures because she did not believe that technology was available at the time.

According to Mary, Minch kept the photographs, but he testified he left them at the photography store to be picked up later, which he believed [petitioner] must have done because Minch later saw the fossil photographs in a work journal. Minch explained that the shop owner also viewed the photographs. In any event, like Mary, Minch agreed the photographs did not show [petitioner] exposing himself or anything inappropriate. But Minch claimed Mary threatened she would "get" [petitioner]. When Minch went back to his workplace, he told [petitioner] that Mary accused him of taking "inappropriate photographs" of her daughter.

According to Mary, [petitioner] then called her and apologized profusely, stating he was "so sorry" and imploring her not to call the police. Mary hung up on him.

Marian Barnes, a volunteer paleontologist, had been one of the guests at the pool party. She saw E.B. and [petitioner] in the pool together jumping off the diving board, and she saw a camera flash at some point, but she did not observe anything untoward. She helped Mary try to obtain copies of the pictures developed at the photography store, to no avail. On January 17, 1995, she received at least three phone calls from [petitioner], who was upset because Mary would not talk to him. He urged Barnes to persuade Mary not to call the police and, in return, promised to do whatever Mary wanted.

On January 20, 1995, Mary reported the incident to Fountain Valley Police Department Patrol Officer Harry Harrison, who interviewed her and E.B. at their apartment. According to Harrison, Mary told him she picked up the photographs from the photography shop, but he acknowledged at trial that he had almost no independent recall of the event and instead relied on the report he later prepared, which he admitted was somewhat cryptic. Harrison obtained [petitioner's] name, date of birth, address, driver's license number, and an identifying photograph, and then turned the case over to a detective for a more detailed investigation.

Mary called [petitioner] and left a message for him after the police interview. She claimed he called her back and offered her money, his vehicle, and that he "would do anything to make it up to [her]." She warned him not to call her again.

Detective Kim Brown of the sex crimes unit interviewed E.B. and Mary at the police station on January 24, 1995. E.B. described the pool incident and also told Brown about the time [petitioner] exposed himself to her inside the apartment. Mary

later testified at trial that she had recorded on her answering machine one of [petitioner's] apologetic telephone calls, and gave the recording to Brown. But Brown had no recollection of the recording and had not noted it in her police report, which she would have done if she received evidence from a reporting party. After interviewing E.B. and Mary, Brown interviewed Minch before attempting to contact [petitioner].

Over the next few days, Mary attempted to contact [petitioner] without success, and she became concerned he had left for the Philippines, where he and his wife had property. She knew before the pool party that [petitioner] had mentioned planning to travel to the Philippines for a few months, which he did from time to time. She contacted Detective Brown to inform her [petitioner] might have left the country and that he had said he would be returning around May. Brown called the airline Mary believed [petitioner] would have used, Continental Airlines, but she was not able to discover whether [petitioner] had been on any of the company's flights to the Philippines. Brown later noted that in 1995, before the 9/11 tragedy, airlines were not as diligent in recordkeeping and, moreover, a person could easily fly under an assumed name. But there was no evidence [petitioner] had done so. Brown completed her report on April 24, 1995, submitted it to the district attorney's office, which filed its felony complaint in June 1995, and an arrest warrant issued that month.

But it turns out [petitioner] and his wife, who also had been at the pool party, had gone to the Philippines in February 1995. Minch later explained in a pretrial hearing in 2014, after [petitioner] was "brought back" from the Philippines, that he had taken the couple to the airport on or around February 6, 1995.FN.2. [Petitioner] had provided Minch written notice in December 1994 of his impending trip, and Minch noted [petitioner] worked hard to get his job done curing fossils for Minch before he left. Minch knew [petitioner] wanted to return within several months if there was work to do, but after a few months passed, Minch spoke to [petitioner] by telephone to let him know he had no new projects for him. Minch later received correspondence from [petitioner] and fliers advertising the resort property [petitioner] and his wife developed and operated in the Philippines.

FN.2. [Petitioner's] wife testified at trial that her husband had been "brought back" to the United States from the Philippines, apparently in August 2014. The jury was not told that he was accompanied by a U.S. Marshal upon his return, and it was not clear whether he had been deported by the Filipino government or was extradited by United States officials.

[Petitioner's] longtime friend, John Smith, also explained at the pretrial hearing that in late January 1995, he and [petitioner] had driven [petitioner's] van and many belongings to the East Coast to store the van, visit Smith's family and several Civil War battlefields, and to ship the belongings to the Philippines. The trip had been finalized in early January, three weeks in advance before their departure on or around January 27, 1995. Smith knew it was [petitioner's] long-range goal to develop a surfing resort in the Philippines. [Petitioner] had made similar trips to the Philippines in the past, but returned for work when he needed funds to develop his property. After storing the van and shipping [petitioner's] and his wife's goods, [petitioner] and Smith flew back to California, where Minch later took them to Los Angeles International Airport for their Philippines flight.

[Petitioner] and his wife returned with their daughter to the United States in 2001 to work for Minch on a "big job" that lasted around seven months. [Petitioner] renewed his passport at the U.S. Embassy in the Philippines for his return. Once

in Orange County, however, they did not rent a car, but instead borrowed one of Minch's old work trucks, and Minch paid both of them as contractors. They did not check into or stay in a hotel during their visit, living instead at a friend's home. [Petitioner] was not picked up by the police on his arrest warrant, which remained outstanding. He even traveled to Mexico with his family in Minch's truck and to Florida to visit his mother, where the truck broke down before they flew out again for the Philippines. While he was living in California, [petitioner] did not register as a sex offender as he was required to do under his previous child sex offense convictions.

Among other pretrial motions, [petitioner's] sought to exclude evidence of those prior convictions as more prejudicial than probative, but the trial court denied his motion. At trial, [petitioner] entered a stipulation alerting the jury he had pleaded guilty to molesting both of those victims,(FN.3) and the victims testified briefly. The first, Shannon A., explained that when she was 11 or 12 years old in June 1983, [petitioner] was her neighbor and her parents' friend, and she accompanied him to the beach with one of her friends, Dona, and Dona's father. When Dona's father went surfing, [petitioner] approached her and Dona with a camera and asked them to do "the splits." Both girls heeded his direction, and when [petitioner] told them to pull their bathing suit bottoms aside to expose their genitals, Dona complied, but Shannon felt "uncomfortable" and did not.

FN.3. The stipulation also noted that the police reports from those offenses were no longer available.

[Petitioner] took the children out to the reef, where he had the girls sit on his lap while he had an erection. When they returned from the beach, [petitioner] invited Shannon into her apartment, but she declined, and told her mother what happened. Her mother contacted the police, and [petitioner] pleaded guilty to committing a lewd and lascivious act on a child under age 14 (§ 288, subd. (a)) by touching Shannon in a sexual manner.

Elizabeth H. also testified and explained that in 1980, she was nine years old, [petitioner] was her parents' friend, and he lived in the neighborhood. He approached her on a February afternoon while she was playing outside with her little sister, and told her that her parents had given him permission to take her picture at the beach.

During the drive to the beach, [petitioner] asked her to sit on his lap and when she complied, she felt his erect penis. He reached into his pants, pulled out his penis, and "scooted [her] over a little bit more on top of him." She was wearing a short dress and felt his penis on her bare skin. At the beach, he took pictures of her sitting on a rock, but when they returned to his van, he had her lay face down in the back. He removed her underpants and got on top of her. He placed his penis between her legs, removed it for a minute, and then when he put it back between her legs, she felt it was "wet."

She did not have any memory of what happened after that, until she found herself back at [petitioner's] home. He gave her ice cream and made what she considered a threat, stating, "[W]e wouldn't want anything to happen to your little sister, so we shouldn't tell anybody about this." Elizabeth told her mother that night, and submitted to a police interview and a sexual assault examination. [Petitioner] again pleaded guilty to lewd and lascivious touching of a minor. (§ 288, subd. (a).)

(Docket No. 14-16 at 2-8).

III

PETITIONER'S CONTENTIONS[3]

1. Petitioner's conviction violates his right to due process because he is actually innocent of the charged crime. (Docket No. 1 at 5).

2. The trial court deprived petitioner of his right to a speedy trial. (Id.).

3. The State violated petitioner's right to due process by engaging in deliberate and negligent abuse in the following two ways:

   a. charging petitioner with crimes for which the statute of limitations already had run;

   b. extraditing him in a manner that violated a treaty between the United States and the Philippines;

   c. failing to extradite him in a timely manner. (Id. at 8-9).

4. The State deprived petitioner of his Sixth Amendment right to present a complete defense by negligently allowing nineteen years to pass between the crime and petitioner's arrest. (Docket No. 1 at 4; Docket No. 1-1 at 91-98).

5. The trial court committed the following instructional errors that deprived petitioner of his right to due process and a fair trial:

   a. failing to give a pinpoint instruction concerning the destruction of evidence;

   b. instructing the jury that it could infer petitioner's consciousness of guilt based on the fact that he fled prosecution;

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[3] Due to the rambling and repetitive nature of petitioner's allegations, it is difficult to determine the precise nature of each of his claims. The Court, however, has endeavored to identify and address each such claim. In doing so, the Court addresses some of petitioner's separate grounds for relief in the same analysis, to the extent that the grounds are repetitive of each other. Moreover, in an effort to avoid redundancy, the Court has re-numbered some of petitioner's grounds for relief.

c. instructing the jury that it could find petitioner guilty even if the jury did not find that he committed the charged crimes on the specific date identified by the victim. (Docket No. 1 at 13-14).

6. The prosecutor committed misconduct by charging petitioner with a felony because petitioner initially was charged with a misdemeanor. (Id. at 16-17).

7. Trial and appellate counsel committed a series of errors that, alone or in combination, deprived petitioner of his right to effective assistance of counsel. (Id. at 13, 15).

8. The cumulative impact of the foregoing trial errors rendered petitioner's trial fundamentally unfair. (Id. at 8).

9. Petitioner's sentence violates the Eighth Amendment's ban on cruel and unusual punishment. (Id. at 16).

10. The state courts erred in denying petitioner's state court petitions for writ of habeas corpus without first conducting an evidentiary hearing. (Id. at 16).

IV

STANDARD OF REVIEW

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in its review of this action. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As explained by the Supreme Court, section 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's

application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In Williams, the Court held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; see Weighall v. Middle, 215 F.3d 1058, 1061-62 (9th Cir. 2000) (discussing Williams). A federal court making the "unreasonable application" inquiry asks "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409; Weighall, 215 F.3d at 1062. The Williams Court explained that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 411; accord: Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," Lindh, 521 U.S. at 333 n.7, that "demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). A federal court may not "substitut[e] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." Id. at 25; Early v. Packer, 537 U.S. 3, 11, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (holding that habeas relief is not proper where state court decision was only "merely erroneous").

The only definitive source of clearly established federal law under the AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law (Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999)), only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. Williams, 529

U.S. at 412; Moses v. Payne, 555 F.3d 742, 759 (9th Cir. 2009). Furthermore, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

A federal habeas court conducting an analysis under § 2254(d) "must determine what arguments or theories supported, or, [in the case of an unexplained denial on the merits], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."). In other words, to obtain habeas relief from a federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). Here, petitioner asserted his second ground for relief on appeal to the California Court of Appeal, which issued a reasoned opinion rejecting that ground. (See Docket No. 14-16 at 8-15). The California Supreme Court then summarily denied the ground. (See Docket No. 14-18). Petitioner asserted each of his other grounds for relief in the habeas petition that he filed in the Orange County Superior Court, which issued a reasoned opinion rejecting each of those grounds for relief. (See Docket Nos. 14-29, 14-30). Thereafter, the California Court of Appeal and the California Supreme Court summarily denied the grounds for relief. (See Docket Nos. 14-33, 14-38). Accordingly, the Court reviews the California Court of Appeal's reasoned opinion rejecting petitioner's second ground for relief and the Orange County Superior Court's reasoned opinion rejecting petitioner's other grounds for relief under AEDPA's deferential standard. See Ylst, 501 U.S. at 803; Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2

(9th Cir. 2000) (district court "look[s] through" unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment).

V

DISCUSSION

GROUND ONE: ACTUAL INNOCENCE

In his first ground for relief, petitioner maintains that his conviction violates his right to due process because he is actually innocent. (Docket No. 1 at 5). Although styled as an actual innocence claim, petitioner's first ground for relief appears to be directed at the sufficiency of the evidence supporting his conviction. (See id. at 90). Indeed, in support of this ground for relief, petitioner cites Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and argues that a reasonable juror would not have found him guilty because no evidence, other than the victim's testimony, showed that he asked the victim to take a naked picture of him.[4] (Docket No. 1 at 90-99). Regardless, as explained below, whether construed as an actual innocence claim or as a sufficiency of the evidence claim, petitioner's first ground for relief fails.

A. Procedural Bar

Petitioner asserted this ground for relief in the second habeas petition that he filed in the Orange County Superior Court. (See Docket No. 14-29). The superior court construed the ground for relief as a sufficiency of the evidence challenge and then rejected it because petitioner could have, but failed to assert the challenge in his direct appeal:

> It is well settled that an issue that could have been raised on appeal but was not is precluded from consideration on habeas corpus. It appears that these issues, as presented, would properly have been raised on appeal, as they concern matters that are based on facts squarely inside the appellate record. Petitioner does not explain why direct appeal was inadequate or set forth any justification why this issue should be raised on habeas corpus in the first instance.

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[4] Petitioner also maintains that the witness testimony presented by the prosecution was unreliable. (See Docket No. 1 at 90-99).

(Id. at 5 (citations omitted)). Citing the superior court's stated reason for rejecting this ground for relief, respondent maintains that the ground for relief is procedurally barred. (Docket No. 13-1 at 29-30). Respondent is correct.

For a state court denial based on a procedural rule to bar federal review, the state rule must constitute an "adequate and independent state ground" for denying relief. Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). "For a state procedural rule to be 'independent,' the state law basis for the decision must not be interwoven with federal law." La Crosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001). For a state rule to be "adequate," it must have been "well-established and consistently applied" at the time it was applied by the state court in the petitioner's case. Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003). Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the petitioner has the burden to show that the state procedural ground is inadequate. Bennett, 322 F.3d at 586.

When a respondent shows that a claim is procedurally barred, the burden of proof shifts to the habeas petitioner to show "cause" for the default and actual "prejudice" resulting from the alleged constitutional violation. Carter v. Giubino, 385 F.3d 1194, 1198 (9th Cir. 2004). Cause for a procedural default exists where "something external to the petitioner, something that cannot fairly be attributed to him impeded his efforts to comply with the State's procedural rule." Maples v. Thomas, 565 U.S. 266, 267, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012). To show prejudice sufficient to excuse a procedural default, the petitioner "must establish not merely that the alleged error created a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting the entire proceeding with constitutional error." Stokley v. Ryan, 705 F.3d 401, 403 (9th Cir. 2012) (citing Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (prejudice requires showing that error has "substantial and injurious effect" on verdict)). If the petitioner cannot show cause and prejudice, he nevertheless may be able to prosecute an otherwise procedurally barred claim if he can show "that a failure to consider his claim[] would result in a fundamental miscarriage of justice." Powell v. Lambert, 357 F.3d 871, 874 (9th Cir. 2004).

The California Supreme Court has held that "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." In re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953). The Supreme Court has held that California's Dixon bar is both independent and adequate. Johnson v. Lee, __ U.S. __, 136 S. Ct. 1802, 1806, 195 L. Ed. 2d 92 (2016). Accordingly, Ground One is procedurally barred. Moreover, petitioner has not shown either cause for the default or actual prejudice resulting from the alleged constitutional violation. Nor has he shown that a failure to consider his claim would result in a fundamental miscarriage of justice. Consequently, this Court cannot reach the merits of petitioner's claim in Ground One.

B. Merits

Even assuming that Ground One is not procedurally barred, it nevertheless fails on its merits.

1. Sufficiency of the Evidence

Habeas relief is unavailable on a sufficiency of the evidence challenge unless "no rational trier of fact could have agreed with the jury." Cavazos v. Smith, 565 U.S. 1, 2, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) (per curiam); Jackson, 443 U.S. at 319. All evidence must be considered in the light most favorable to the prosecution. Jackson, 443 U.S. at 319. Accordingly, if the facts support conflicting inferences, reviewing courts "must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. at 326; Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (per curiam); Turner v. Calderon, 281 F.3d 851, 882 (9th Cir. 2002). Under AEDPA, federal courts must "apply the standards of Jackson with an additional layer of deference." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005).

Furthermore, circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction. See Jones v. Wood, 207 F.3d 557, 563 (9th Cir. 2000) (finding sufficient evidence for murder conviction where "evidence was almost entirely circumstantial and relatively weak"). The reviewing court must respect the exclusive province of the factfinder to determine the

credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts. See United States v. Goode, 814 F.2d 1353, 1355 (9th Cir. 1987).

Here, the prosecutor introduced sufficient evidence to show that petitioner committed the charged crime of felony child molestation. The victim testified that petitioner asked her to take a photograph of petitioner and that, when she attempted to do so, petitioner exposed his genitals to her. Moreover, the victim testified that this incident was not the first time that petitioner had exposed himself to her. Although petitioner faults the prosecutor for failing to present any physical or eyewitness testimony to corroborate the victim's testimony about his misconduct, no such evidence was needed to prove that he committed the charged crime. If believed, the victim's testimony, alone, was sufficient to prove that petitioner committed the charged crime. See Bruce, 376 F.3d at 957-58 (explaining that testimony of single witness is sufficient to uphold conviction).

Moreover, although the prosecutor was not obligated to introduce any other evidence to support the jury's verdict, the record shows that there was ample circumstantial evidence that supported the reasonable inference that petitioner committed the charged crime. Indeed, the victim's mother testified that, once she contacted police about the incident, petitioner offered her money and said that he "would do anything to make it up to [her.]" (Docket No. 14-16 at 4). What is more, petitioner had a history of molesting underage girls, having already been twice convicted of committing lewd and lascivious acts against girls under fourteen years of age.

In sum, there was sufficient evidence to support the jury's verdict. As such, petitioner's sufficiency of the evidence claim fails.

2. Actual Innocence

To the extent that petitioner has asserted a freestanding claim of actual innocence, that claim fails for several reasons. First, the United States Supreme Court has never recognized that such a claim is cognizable on federal habeas review. On the contrary, the Supreme Court expressly has left open the question. See McQuiggin v. Perkins, 569 U.S. 383, 392, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); District Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 71-72, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009)

(whether federal constitutional right to be released upon proof of "actual innocence" exists "is an open question"). Although the Supreme Court has suggested the possibility of a "hypothetical freestanding innocence claim," it has stated that such a claim, if one is ever recognized, would be applicable only in capital cases. House v. Bell, 547 U.S. 518, 554-55, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006); see also Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

Second, even assuming that a freestanding claim of actual innocence in a non-capital case is cognizable, petitioner has not made the showing necessary to warrant habeas relief. In Jones v. Taylor, 763 F.3d 1242, 1246 (9th Cir. 2014), the Ninth Circuit, while noting the uncertainty of a viable freestanding actual innocence claim in a federal habeas corpus proceeding in the non-capital context, set forth the standard that would govern such claims if, in fact, they were cognizable. The Ninth Circuit began by noting that the standard is "extraordinarily high and . . . the showing [for a successful claim] would have to be truly persuasive." Id. (citations and internal quotations omitted); Herrera, 506 U.S. at 442-44 (Blackmun, J., dissenting). "[A]t a minimum, the petitioner must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Taylor, 763 F.3d at 1246.

The Ninth Circuit's opinion in Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (*en banc*), is instructive on this point. There, the petitioner argued that he was actually innocent of the murder for which he was convicted. Carriger, 132 F.3d at 465-66. In support of that argument, the petitioner presented the statement of another suspect, who credibly confessed to the murder and provided details of the murder that only would have been known to a participant in the murder. Id. at 474-76. The suspect further boasted that the petitioner had been set up, and, moreover, all of the other evidence presented at trial pointed as directly to the new suspect as to the petitioner. Id. Notwithstanding this evidence, the Ninth Circuit held that the petitioner had failed to show that he was actually innocent because he had presented no evidence "demonstrating he was elsewhere at the time of the murder, nor [was] there any new and reliable physical evidence, such as DNA, that would preclude any possibility of [his] guilt." Id. at 477.

Here, petitioner has failed to prove that he is actually innocent. At best, petitioner cites a lack of physical evidence or eyewitness testimony corroborating the victim's account of petitioner's actions. That purported deficiency in the evidence does not prove that petitioner is innocent, and it in no way undermines the testimony of the victim. Moreover, unlike in Carriger, where all of the other evidence presented at trial pointed as directly to a new suspect as to the petitioner, the evidence at trial, here, pointed only to petitioner.

Put simply, petitioner has not met the extraordinarily high standard to succeed on his free-standing actual innocence claim, assuming such a claim is, in fact, cognizable. Compare with House, 547 U.S. at 553-55 (DNA evidence undermining both petitioner's link to crime scene and his motive for crime, coupled with disinterested eyewitness testimony implicating someone else in murder, was insufficient to show actual innocence because other uncontested evidence pointed to petitioner's guilt). Accordingly, habeas relief is not warranted as to this ground for relief.

GROUND TWO: RIGHT TO A SPEEDY TRIAL

In his second ground for relief, petitioner contends that the State deprived him of his right to a speedy trial by waiting nearly twenty years after the alleged crime to arrest him. (Docket No. 1 at 5, 7). Because of this inordinate delay, according to petitioner, evidence necessary to show his innocence was lost or destroyed. (Docket No. 1-1 at 2-47). In addition, petitioner maintains that he was disadvantaged by changes in California's evidence law that resulted in the trial court improperly admitting evidence of his prior convictions for sexual misconduct. (Id. at 48-53).

A. The California Court of Appeal's Opinion

Petitioner raised this claim in the direct appeal that he filed in the California Court of Appeal. (See Docket No. 14-13). The court of appeal rejected the claim. (See Docket No. 14-16 at 8-15). In doing so, the court of appeal noted that petitioner had "concede[d] the Sixth Amendment's speedy trial right d[id] not apply because it is triggered by the formal accusation and probable cause finding in an indictment or by the arraignment actually commencing trial proceedings." (Id. at 8). Turning to petitioner's claim that the pre-indictment delay violated his right to due process, the court of appeal ruled that petitioner could not establish a due process violation because he did

not suffer prejudice from the delay. (Id. at 9-15). In so ruling, the court of appeal reasoned as follows:

> [Petitioner] contends the lengthy delay before his arrest and trial prejudiced him in four specific ways. First, he could not use the photographs from the pool party, which had disappeared, to show the jury he did not expose himself to E.B. as she claimed. Second, the purging of police records concerning Shannon's and Elizabeth's earlier allegations deprived him of police reports that may have been useful to impeach details in their testimony while, conversely, in the alleged pool incident involving Erin, the investigating officers' lack of independent recall apart from their police reports also prejudiced him. Third, the enactment of section 1108 in 1996 harmed him by providing for the admission of propensity evidence. And fourth, he could not obtain telephone records to possibly impeach claims he called Barnes and E.B.'s mother to implore them not to call the police.
>
> These claims do not meet [petitioner's] burden to establish prejudice. As the trial court observed, they are largely speculative or conclusory and, in any event, the lack of tangible evidence such as photographs or a supposed recording on E.B.'s mother's answering machine inured to the benefit of the defense, not the prosecution. [Petitioner] claims the photographs were particularly important because "a picture is worth a thousand words." He reiterates defense counsel's claim below that, if the photos had not disappeared in the intervening years, "Perhaps we could have shown that [photograph] and said, look here he is in the water. He's not exposing himself. This is the incident [E.B.] was referring to" when she claimed [petitioner] directed her to take his picture. [Petitioner] also asserts that because "the photography shop no longer existed in 2014" he was prejudiced because he "lost the opportunity to find, interview, and call as a witness . . . the photography shop employee who developed the film," nor could he obtain the negatives.
>
> Nothing suggests, however, that a photography shop would retain a customer's negatives. More importantly, both a defense witness (Minch) and a prosecution witness (E.B.'s mother) explained they did review the photographs when they were developed and they agreed they depicted nothing inappropriate, which supported [petitioner's] defense. It is speculative to assume a photo shop employee would have had details to add that would aid [petitioner]. The trial court observed that E.B. seemed to suggest that by taking the picture, she bolstered her claim [petitioner] exposed himself, but the absence of the pictures undercut her testimony. As the trial court put it, "[The] evidence . . . before the jury . . . refuted essentially what [E.B.] said," in that "everybody else [agreed], 'I -- we never saw any inappropriate pictures,' including her mom." Where some evidence supports the trial court's conclusion there was no prejudice, as here, we may not "reweigh it." (People v. Hill (1984) 37 Cal.3d 491, 499 ["[p]rejudice is a factual question to be determined by the trial court" and thus, "the factual conflict was to be won or lost at the trial level"]).
>
> [Petitioner's] claim of prejudice arising from the absence of police reports concerning the earlier victims or independent recall by the officers investigating E.B.'s claim similarly fail, but for the opposite reason as the photographs. It was clear the pool photographs depicted nothing incriminating and [petitioner] had the benefit of that testimony, but his claim that earlier police reports "may have" included inconsistent statements by Shannon or Elizabeth was purely speculative. "[B]are conclusionary statements" that "delay has precluded [the defendant] from fully investigating the accuracy of [witness] statements" do not show actual prejudice.

(Crockett, supra, 14 Cal.3d at p. 442). [Petitioner's] hope that the police reports might have furnished impeachment grounds was wholly speculative, and the trial court therefore properly disregarded it because it was his burden to establish prejudice. (Ibid.)

Moreover, neither Shannon nor Elizabeth expressed any difficulty in recalling the important aspects of their childhood encounters with [petitioner]. Additionally, the prosecutor turned over to the defense audio recordings of her investigator's pretrial interviews with both girls, now adult women, so [petitioner] had the opportunity to prepare for and dispute their recollection of what he had done. Nothing suggested he had difficulty recalling any mitigating details in his encounter with either of them. It was pure speculation that either witness may have added or subtracted important facts in their testimony about offenses [petitioner] admitted.

[Petitioner] claims he suffered similar prejudice because the officers investigating the pool incident had to rely so heavily on their reports. In effect, he argues that if they could independently recall their investigative steps, it would have benefitted him. But that turns his burden to demonstrate prejudice on its head. As it was, the officers' reports supported [petitioner], whereas their independent recollection offered him no benefit. Specifically, their reports were useful for casting doubt on the credibility of E.B.'s mother because she claimed she had given the police an inculpatory message [petitioner] left on her answering machine, but nothing in the police reports supported that claim. Similarly, she told Officer Harrison that she had picked up the pool party photographs, but no evidence supported that claim; to the contrary, her testimony at trial contradicted it. Consequently, [petitioner's] claim that something the officers must have forgotten would have aided him, as evidenced by their lack of independent recall of their investigation, was merely speculative and therefore furnished no support for his speedy trial or due process claims.

The same is true for his claim that he was prejudiced by delay because in the interim Evidence Code section 1108 was enacted, under which his prior sex crimes were introduced at trial. (All further statutory citations are to this code, unless noted.) This tack fails for several reasons. First, section 1108 became law on January 1, 1996, less than a year after [petitioner] exposed himself to E.B. (See People v. Davis (2009) 46 Cal. 4th 539, 603, fn. 6 [no ex post facto violation in applying section 1108 to an offense occurring before its enactment]). It is far from clear that even if [petitioner] had not departed for the Philippines, he would have been brought to trial before its effective date. Moreover, he cannot rewrite history: he did leave for the Philippines, and even assuming he did so with no intent to flee the jurisdiction and the authorities had promptly secured his return as he claims they should have done, his trial almost certainly would have commenced after section 1108's effective date. It therefore still would have applied to his trial.

Second, the purpose of the speedy trial protection is to guard against prejudice that may arise from willful or negligent official conduct, including the loss of evidence or faded memories. (Jones, supra, 3 Cal. 3d at p. 738). But nothing suggests, and [petitioner] cites no authority, that it applies to changes in the law or trial procedure.

Third, [petitioner's] claim also fails because his prior offenses would have been admissible even if he had been tried in 1995 before section 1108's enactment. Evidence of prior "bad acts" was and remains admissible under section 1101, subdivision (b), to show the perpetrator's intent. The charged offense and other conduct offered to support the charge must be "sufficiently similar to support a

rational inference" of the asserted material fact, including intent. (People v. Kipp (1998) 18 Cal. 4th 349, 369). But the "least degree" of similarity is required to show intent (People v. Ewoldt (1994) 7 Cal. 4th 380, 402 (Ewoldt)); that is, similar enough to support the inference the defendant probably harbored the same intent on each occasion. (People v. Memro (1995) 11 Cal. 4th 786, 864-65). The crimes here met that low threshold to show [petitioner's] sexual intent in his child victims. All were roughly the same age, [petitioner] gained access to them by befriending their parents, and in each case used photography to induce the child to participate in a sexual encounter. [Petitioner's] claim of prejudice in the general admissibility of section 1108 evidence has no merit.

Finally, [petitioner's] claim that he was prejudiced by the destruction of phone records to contest Mary's claims he called her and made inculpatory statements in those calls is again only speculative. This is particularly true where Barnes's testimony concerning similar calls corroborated Mary's account. Because [petitioner] failed to meet his burden to show any actual prejudice he suffered in the loss of evidence or any other manner from the pretrial delay, his speedy trial and due process claims fail.

(Id. at 11-15).

B. Federal Legal Standard and Analysis

1. Sixth Amendment Right to Speedy Trial

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend. VI. The Supreme Court has described this right "'an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971) (citation omitted).

However, the Supreme Court has made clear that the Sixth Amendment right to a speedy trial is not triggered unless an indictment or information is filed or unless the defendant is arrested and held to answer: "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." Id. Here, petitioner cannot establish a Sixth Amendment speedy trial violation because the delay of which he complains preceded his indictment and arrest.

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2. Fifth Amendment Right to Speedy Trial

The United States Supreme Court has addressed due process claims based on pre-indictment delay in two decisions: Marion, 404 U.S. 307, and United States v. Lovasco, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). In Marion, the Supreme Court stated that the due process clause of the Fifth Amendment may, under some circumstances, require dismissal of a prosecution based on a pre-indictment delay even when the prosecution was brought within the applicable limitations period. 404 U.S. at 324. The Marion court, however, refused to find a due process violation because, in that case, the defendants did not show actual prejudice or that the government intentionally delayed the prosecution to gain some tactical advantage or to harass them. Id. at 324-25.

Subsequently, in Lovasco, the Supreme Court explained that, in terms of pre-indictment delay claims for relief, "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 U.S. at 790. If a defendant can surmount the burden to show prejudice, "the due process inquiry must consider the reasons for the delay. . . ." Id. Despite Lovasco's unequivocal statement that both prejudice and justification drive a court's analysis of a pre-indictment claim for relief, there is no Supreme Court precedent "set[ting] out a clear test for balancing justification against prejudice. . . ." New v. Uribe, 532 F. App'x 743, 744 (9th Cir. July 5, 2013).

Moreover, neither Lovasco nor Marion specified "when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." Marion, 404 U.S. at 324-25. The Ninth Circuit, however, has made clear that a defendant prosecuting a pre-indictment delay claim must establish "actual, non-speculative prejudice from the delay." United States v. Corona-Verbera, 509 F.3d 1105, 1112 (9th Cir. 2007). The Ninth Circuit, furthermore, has emphasized that establishing prejudice is a heavy burden, and one that is "rarely met." Id. This heavy burden cannot be met by generalized assertions about the witnesses' diminished memories, the loss of witnesses, or the loss of evidence. United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995); see also United States v. Kendricks, 692 F.2d 1262, 1267 (9th Cir. 1982) (holding that criminal defendant did not show actual prejudice because defendant

merely speculated as to what one witness may have forgotten or what certain allegedly missing documents may have revealed). Rather, under the Ninth Circuit's test, the defendant must show that "lost testimony, witnesses, or evidence 'meaningfully has impaired his ability to defend himself and [t]he proof must demonstrate by definite and non-speculative evidence how the loss of a witness or evidence is prejudicial to [his] case.'" Corona-Verbera, 509 F.3d at 1112.

Here, the court of appeal reasonably concluded that the pre-arrest delay did not violate petitioner's right to due process. First, as the court of appeal explained, petitioner suffered no actual prejudice from the pre-indictment delay. Although, as he did in his direct appeal, petitioner argues here that he was prejudiced by the destruction or disappearance of relevant evidence, his allegations of prejudice are either baseless or speculative. For example, he contends that, because of the inordinate pre-arrest delay, the photographs from the day of the alleged crime were lost. As a result, according to petitioner, he could not use those photographs to prove that the victim had fabricated her allegations of misconduct. Putting aside the fact that there is no evidence in the record to suggest that the police played any role in the purported disappearance of the photographs, petitioner suffered no prejudice because the uncontraverted testimony by the only two testifying witnesses to have viewed the photographs established that the photographs depicted nothing improper. Indeed, one of the two witnesses to testify to that fact was the victim's own mother. In other words, even without the benefit of the actual photographs, the jury was well-aware that the contents of the photographs depicted no criminal or inappropriate activity. As such, there is no reason to believe that disappearance of the photographs resulted in actual prejudice. See Mejorado v. Hedgpeth, 629 F. App'x 785, 787 (9th Cir. Oct. 29, 2015) ("Neither the exclusion nor the admission of cumulative evidence is likely to cause substantial prejudice.") (citing Wong v. Belmontes, 558 U.S. 15, 22-23, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009); Jackson v. Brown, 513 F.3d 1057, 1084-85 (9th Cir. 2008)).

Moreover, there is no reason to believe that the purging of police records pertaining to petitioner's prior molestation victims resulted in actual prejudice. As the court of appeal noted, neither victim showed any difficulty in recalling the key aspects of petitioner's conduct. What is more, petitioner was provided audio recordings of pretrial interviews conducted with the victims,

both of whom were adults at the time of the interviews. To be sure, petitioner did not have access to the purged police reports. But petitioner cites no reason -- other than optimistic speculation -- to believe that the contents of those reports would have been beneficial to his defense. And, indeed, it is equally likely, if not more likely, that the contents of those reports may have been detrimental to petitioner's defense. After all, petitioner pleaded guilty to molesting both victims. Presumably, he did so because the evidence against him was sufficiently strong to make a trial too risky of an option to take. That evidence surely would have been reflected in the police reports pertaining to the crimes. The Court, however, need not engage in such speculation because, as explained above, petitioner cannot show that the contents of the purged records would have helped his defense.

There is, likewise, no merit to petitioner's claim that a change in the law during the nearly twenty years between the crime and his arrest disadvantaged him. According to petitioner, evidence regarding his prior molestation convictions was admitted into evidence because, after he committed the crime, California enacted a rule of evidence allowing for the admission of prior sex crimes at trial. However, as the court of appeal explained, the evidence code in question was enacted less than one year after petitioner committed the charged crime and was, thereafter, applied retroactively to cases pending before its enactment. Thus, even if petitioner had not left for the Philippines, there is every reason to believe that the rule of evidence in question would have applied at petitioner's trial. Putting that aside, the court of appeal explained that, even without the subject evidentiary rule, evidence regarding petitioner's prior molestation convictions would have been admissible under California law existing at the time when petitioner committed the charged crime. This Court is bound by the court of appeal's interpretation of California law. See Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (per curiam) (stating that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); Himes v. Thompson, 336 F.3d 848, 852 (9th Cir. 2003) ("We are bound by a state's interpretation of its own laws.").

Furthermore, as the court of appeal observed, the purported prejudice arising from the destruction of phone records between him and the victim's mother (and between him and Barnes)

is, at best, speculative. At most, petitioner optimistically contends that the missing phone records would have shown that he did not, as the victim's mother testified, call the victim's mother and beg her not to report his conduct to police. Such unsupported, speculative contentions are not sufficient to show actual prejudice from a pre-indictment delay. See Corona-Verbera, 509 F.3d at 1112 (supra). And, as the court of appeal noted, the testimony of the victim's mother about petitioner's attempts to persuade her not to contact the police was corroborated by the testimony of Barnes, who was the recipient of similar pleas from petitioner.

Second, even assuming petitioner could establish prejudice from the delay between the crime and his arrest, he nevertheless cannot show that the State was responsible for the delay or that the State intentionally delayed the prosecution to gain some tactical advantage or to harass him. On the contrary, the nearly two-decade-long delay between the crime and petitioner's arrest was attributable to petitioner himself -- specifically, to his decision to leave the country. Although petitioner returned to the United States six years later, the evidence at trial supported a reasonable inference that petitioner took steps to ensure that his return to the United States went unnoticed. Indeed, although petitioner, having already been twice convicted of child molestation, was required to register as a sex offender, he did not do so during his return to the United States. He also did not leave a paper trial showing that, in fact, he had returned to the United States. Rather, he borrowed a car and stayed at a friend's home. What is more, he returned to the Philippines, where he remained for over a decade before finally being arrested. In short, despite the long delay between the crime and his arrest in the Philippines, petitioner suffered no actual prejudice. What is more, petitioner, and petitioner alone, was the cause of the delay. Accordingly, the court of appeal's conclusion that petitioner suffered no due process violation was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.[5]

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[5] In his fourth ground for relief, petitioner contends that he was denied his Sixth Amendment right to present a complete defense because the State negligently waited nineteen years after the crime to arrest him. (See Docket No. 1 at 8; Docket No. 1-1 at 91-98). This claim fails and warrants no additional discussion because, as explained above, petitioner suffered no cognizable (continued...)

GROUND THREE: DELIBERATE AND NEGLIGENT ABUSE

In his next ground for relief, petitioner contends that the State violated his right to due process by engaging in deliberate and negligent abuse.[6] (Docket No. 1 at 8-9). Although petitioner faults the State in many respects, the thrust of this ground for relief is that the State exercised no diligence in attempting to (and therefore had no excuse for failing to) apprehend petitioner during the nineteen years between the date of the crime and his ultimate arrest. (See, e.g., id. at 80 (alleging "gov. negligence deliberately failing to pursue [petitioner] over 19 years"); id. at 81 (alleging that trial court erred in "refus[ing] to make the State gov. culpable of any diligence whatsoever to notify or apprehend [petitioner] through the 19-year delay"); id. at 82 ("There is deliberate gov. conduct not to pursue [petitioner]. There is a State Court refusing to hold the gov. liable for not pursuing [petitioner]."); id. at 83 ("There is no doubt this was purposeful intent where the prosecution is aware of [petitioner's] whereabouts and made a zero effort as here to bring him to Court. The only reasonable conclusion is that the delay was purposeful[.]")). Instead, according to petitioner, the State (through its law enforcement officers) made a "deliberate decision not to contact [petitioner] before he left for the Philippines," even though law enforcement "knew *exactly* when and where [petitioner] was going." (Id. at 82 (emphasis in original)). According to petitioner, law enforcement made this decision in order to "gain an advantage over [him]." (Id. at 83; see also id. at 83 ("There was intent by the gov. to secure a tactical advantage over [petitioner] . . . ."). In addition, petitioner appears to believe that the state courts erred in conducting the relevant "balancing test" to determine who was "most at fault for the delay." (Id. at 81).[7]

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[5](...continued)
prejudice from the delay between the crime and his arrest and because the delay was attributable to his own actions. (See supra).

[6] Although petitioner presented this ground for relief in the habeas petition that he filed in the Orange County Superior Court, it does not appear that the superior court (and, as a result, the California Court of Appeal and the California Supreme Court) actually addressed it. Consequently, the Court reviews this ground for relief under the de novo standard of review.

[7] In connection with this ground for relief, petitioner also alleges that the State "illegal[ly] (continued...)

Petitioner's allegations of deliberate and negligent abuse fail because they amount to little more than a re-hash of his speedy trial claim and because there is no evidence, other than petitioner's self-serving allegations, to show any deliberate misconduct on the part of the State. At bottom, petitioner alleges that he was prejudiced by the nineteen-year delay between the crime and his arrest. However, the Court already has addressed that issue and found that the California Court of Appeal reasonably concluded that petitioner suffered no prejudice as a result of the delay and, thus, suffered no due process violation.[8] And, although petitioner insists that law enforcement deliberately caused the nineteen-year delay either by allowing petitioner to leave the country or by expending no effort in attempting to pursue him, there is no evidence to support that allegation. On the contrary, as explained above, the nearly two-decade-long delay between the crime and petitioner's arrest was attributable to petitioner himself -- specifically, to his decision to leave the country and his actions ensuring that his return to the United States in 2001 went unnoticed. (See supra). In any event, as explained in connection with petitioner's speedy trial claim, he suffered no due process violation because he cannot establish "actual, non-speculative prejudice from the delay." Corona-Verbera, 509 F.3d at 1112 (supra).

Accordingly, habeas relief is not warranted with respect to this ground for relief.

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[7](...continued)
extradit[ed]" him from the Philippines by "fraudulent[ly] manufactured" illegal "charging documents" in order to cover up the fact that the original charging documents had "expired." (Docket No. 1-1 at 82; see also id. at 81 ("The Court ironically took jurisdiction 19 years later on an improperly issued and destroyed misdemeanor warrant from 1995[.]"). This claim is duplicative of the vindictive prosecution claim that he asserts in Ground Six. Accordingly, the Court shall address that argument in connection with petitioner's vindictive prosecution claim. (See infra). Moreover, to the extent that petitioner contends that the statute of limitations had run on the crime of which he was convicted, that contention fails because the state courts concluded that the applicable California statute of limitations had not expired before petitioner was charged with the crime underlying this Petition. (See Docket No. 14-30 at 6 ("[Petitioner] also argues that there was a statute of limitations defense that his public defender should have raised at that point, but it appears from the available record that the charges were timely filed.")). As explained above, this Court is bound by the state court's interpretation of California law. See Bradshaw, 546 U.S. at 76; Himes, 336 F.3d at 852 (see supra).

[8] Had the Court reviewed petitioner's speedy trial claim under a de novo standard of review, the Court would have concluded, as the court of appeal did, that petitioner suffered no prejudice due to the delay between the crime and his arrest.

GROUND FIVE: INSTRUCTIONAL ERROR

In his next ground for relief, petitioner maintains that the trial court deprived him of his right to due process and a fair trial by committing three instructional errors. (Docket No. 1 at 13-14). First, he contends that the trial court erred in failing to give a pinpoint instruction on the destruction of evidence. (Id.). According to petitioner, such an instruction was necessary because police lost or destroyed the photographs that were taken on the day on which the victim claimed that petitioner exposed himself to her after asking her to take his photograph. (Id.). Given this fact, petitioner maintains that the trial court should have instructed the jury that it could infer that the photographs were beneficial to his defense. (Id.).

Second, petitioner contends that the trial court erred in instructing the jury that it could infer his consciousness of guilt based on the fact that he fled prosecution.[9] (Id.). According to petitioner, this instruction was erroneous because he did not flee the country for fear of prosecution, but rather left without knowing that police were looking for him. (Id.).

Third, petitioner faults the trial court for instructing the jury that it could find petitioner guilty of the charged offense even if the jury did not find that petitioner committed the charged offense on the specific date identified by the victim.[10] (Id.). Although it is not entirely clear why petitioner believes that this instruction was improper, he asserts that he could not mount a defense to the charged crimes because so much time had elapsed between the date of the alleged crime in 1995 and his trial in 2015. (See id.).

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[9] At trial, the trial court instructed the jury as follows:

> If the defendant fled immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.

(Clerk's Transcript ("CT") 476).

[10] At trial, the trial court instructed the jury as follows: "It is alleged that the crime occurred on January 14, 1995. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day." (CT 458).

A. Procedural Bar

Petitioner asserted this ground for relief in the habeas petition that he filed in the Orange County Superior Court. (See Docket No. 14-29). The superior court rejected it because petitioner could have asserted, but failed to assert, the challenge in his direct appeal:

> It is well settled that an issue that could have been raised on appeal but was not is precluded from consideration on habeas corpus. It appears that these issues, as presented, would properly have been raised on appeal, as they concern matters that are based on facts squarely inside the appellate record. Petitioner does not explain why direct appeal was inadequate or set forth any justification why this issue should be raised on habeas corpus in the first instance.

(Docket No. 14-30 at 5 (citations omitted)). Citing the superior court's stated reason for rejecting this ground for relief, respondent maintains that the ground for relief is procedurally barred. Respondent is correct. See Johnson, 136 S. Ct. at 1806; Coleman, 501 US. at 729 (supra). Moreover, as with Ground One, petitioner has not shown either cause for the default or actual prejudice resulting from the constitutional violation alleged in this ground for relief. Nor has petitioner shown that a failure to consider his claims would result in a fundamental miscarriage of justice. Consequently, this Court cannot reach the merits of this ground for relief.

B. Merits[11]

Even if the Court were to consider the merits of this claim, petitioner's claim fails. Where a habeas claim rests on an alleged constitutional error arising from a jury instruction, the question is whether the alleged instructional error "by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 70-71, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (citing Cupp v. Naughten, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)). The challenged instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp, 414 U.S. at 146-47. "If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the

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[11] Because the Orange County Superior Court rejected this ground for relief on state procedural grounds, the superior court did not address the merits of the ground for relief. Accordingly, the Court reviews the merits of this ground for relief under the de novo standard of review.

challenged instruction in a way that violates the Constitution." Middleton v. McNeil, 541 U.S. 433, 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) (per curiam) (citations and internal quotation marks omitted). In terms of claims of instructional error, "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). Moreover, even if instructional error is found to rise to the level of a constitutional violation under this standard, federal habeas relief is unavailable unless "the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict." Calderon v. Coleman, 525 U.S. 141, 147, 119 S. Ct. 500, 142 L. Ed. 2d 521 (1998) (citing Brecht, 507 U.S. at 637).

1. Pinpoint Instruction re Destruction of Evidence

Petitioner's claim that the trial court erred in failing to instruct the jury on destruction of evidence fails for several reasons. First, there was no evidence to support it. At bottom, petitioner wanted the trial court to instruct the jury that police had the photographs in their possession and either lost or destroyed them. But he points to no evidence in the record to show that the police were ever in possession of the photographs that were taken on the day of the incident underlying his conviction.

Second, even assuming error, petitioner could not have suffered prejudice. Presumably, petitioner believes that, had he had access to the photographs, he could have shown that the victim's allegations of misconduct were fabricated. But uncontraverted testimony by the only two testifying witnesses to have viewed the photographs established that the photographs depicted nothing improper. Indeed, one of the two witnesses to testify to that fact was the victim's mother. In other words, even without the benefit of the actual photographs, the jury was well-aware that the contents of the photographs depicted no criminal or inappropriate activity. Consequently, petitioner cannot show that the failure to instruct the jury on the destruction of evidence had a substantial and injurious impact on the jury's verdict or the trial proceedings. See Mejorado, 629

F. App'x at 787 ("Neither the exclusion nor the admission of cumulative evidence is likely to cause substantial prejudice.").[12]

2. Consciousness of Guilt

Petitioner cannot show that the instruction on consciousness of guilt deprived him of either his right to due process or his right to a fair trial. First, the instruction given at trial -- CALCRIM No. 372 -- did not lessen the prosecutor's burden of proof. The jury was instructed on the elements of the charged crimes and on the prosecutor's burden to prove each element of that crime beyond a reasonable doubt. (CT 448, 459, 477-78, 480). The jury was also instructed on the beyond-a-reasonable-doubt standard and that it could not convict petitioner if the prosecution failed to meet that standard. (Id. at 448, 459). The jury is presumed to have followed those instructions. Weeks v. Angelone, 528 U.S. 225, 226, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000) (jury presumed to follow judge's instructions). Moreover, the challenged instruction explicitly stated that "evidence that [petitioner] fled cannot prove guilt by itself." (CT 476). Given these instructions, there is little reason to believe that the jury was confused as to the prosecutor's burden to prove petitioner's guilt beyond a reasonable doubt or as to whether it could convict petitioner based solely on testimony that he fled.

Second, the challenged instruction did not require the jury to infer petitioner's guilt based on his act of fleeing. On the contrary, the wording of instruction was properly phrased in permissive, not mandatory, terms. See Francis v. Franklin, 471 U.S. 307, 314-15, 105 S. Ct. 1965, 85 L. Ed.2 d 344 (1985). Specifically, it instructed the jurors that that they were permitted

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[12] To the extent that petitioner argues that the destruction of the photographs, in and of itself, warrants habeas relief, he is mistaken. Assuming that police ever had possession of the photographs, there is no evidence to suggest that they acted in bad faith in failing to preserve the photographs. The government's failure to preserve or collect potentially exculpatory evidence rises to a due process violation only where the "criminal defendant can show bad faith." Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); Miller v. Vasquez, 868 F.2d 1116, 1120-21 (9th Cir. 1989). Bad faith is shown where "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." Youngblood, 488 U.S. at 58. Putting that aside, petitioner could show no prejudice from the failure to preserve the photographs because, as explained above, the uncontraverted testimony at trial showed that the photographs depicted no wrongdoing. Thus, had petitioner had access to the photographs, they would have added little, if anything, to the existing testimony.

-- but were not required -- to "decide the meaning and importance" of petitioner's act of fleeing. (CT 476). Although petitioner maintains that he did not flee the country and that he was unaware that he was accused of a crime, the testimony of the victim's mother, if believed, could support a reasonable inference that, in fact, petitioner fled the country precisely because he had been accused of a crime. What is more, the challenged instruction did not require the jury to determine that petitioner fled; rather, the instruction made clear that the jury, and the jury alone, had to determine whether there was sufficient evidence to prove that petitioner fled. (See id. ("*If you conclude that the defendant fled*, it is up to you to decide the meaning and importance of that conduct.") (emphasis added).

Finally, the inference that the challenged instruction permitted -- namely, that petitioner's act of fleeing may have had some "meaning and importance" -- was proper. Permissive inference instructions, like the one at issue here, are constitutional if the conclusion the instruction suggests can be justified by reason and common sense in light of the proven facts before the jury. Francis, 471 U.S. at 314-15; Hanna v. Riveland, 87 F.3d 1034, 1037 (9th Cir. 1996). Permissive inference instructions do not affect the application of the "beyond a reasonable doubt" proof standard unless there is no rational way the jury could make the connection permitted by the inference. Ulster Cty. Ct. v. Allen, 442 U.S. 140, 157, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) ("Because [a] permissive inference instruction leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference."). Here, CALCRIM No. 372 did not violate petitioner's constitutional rights because a rational trier of fact could have made a connection between petitioner's act of fleeing and his consciousness of guilt.

For the foregoing reasons, petitioner is not entitled to habeas relief with respect to his challenge to the trial court's decision to instruct the jury with CALCRIM No. 372.

3. Date of the Crime

Petitioner cannot show that the trial court erred in instructing the jury it could find petitioner guilty of the charged offense even if the jury did not find that petitioner committed the charged

offense on the specific date identified by the victim. As best as the Court can determine, this claim is not directed at any alleged infirmity in the instruction itself, but rather is an attempt to re-hash petitioner's claim that he was denied his right to a speedy trial. Indeed, in support of this claim, petitioner argues only that the instruction "unreasonably denie[d] petitioner[']s protections afforded to a fair and speedy trial. . . ." (Docket No. 1 at 14). Accordingly, this claim fails for the same reason that his speedy trial claim fails. (See supra).

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Petitioner's instructional error claims fail because they are procedurally barred and because they lack merit. Accordingly, petitioner is not entitled to habeas relief with respect to any of his instructional error claims.

GROUND SIX: PROSECUTORIAL MISCONDUCT

In his next ground for relief, petitioner contends that the prosecutor engaged in vindictive prosecution by issuing an invalid felony arrest warrant for petitioner, even though the prosecutor knew that the applicable statute of limitations to prosecute petitioner had expired. (See Docket No. 1 at 17). According to petitioner, the prosecutor initially issued a misdemeanor arrest warrant for petitioner in 1995, the year in which the underlying crime occurred. (Id.). Petitioner maintains that, at some point before his arrest, that warrant expired and was destroyed, rendering prosecution of petitioner for the charged misdemeanor barred by the applicable statute of limitations. (Id.). Nevertheless, according to petitioner, the prosecutor, in 2014, issued a new charging document in which he charged petitioner with a felony, even though the prosecutor knew the charging document to be invalid. (Id.). By doing so, according to petitioner, the prosecutor improperly extended the statute of limitations to prosecute petitioner. (Id.).

A. The Orange County Superior Court's Opinion

Petitioner raised this claim in a habeas petition that he filed in the Orange County Superior Court. (Docket No. 14-29). The superior court set forth the following facts relevant to this claim:

> According to the available record, a felony complaint was filed on 6/28/95 alleging that petitioner had committed a violation of Penal Code section 647.6 (felony child molesting with prior). The complaint further alleged that petitioner had previously

> been convicted of two felonies.FN. The complaint was signed by the complainant and the Deputy District Attorney, and it contains a stamp by the clerk's office for West Court. A felony warrant was issued, with $50,000.00 bail, on 6/30/95 and returned on 8/24/14. The minutes show that the clerk who entered the minutes for the filing of the complaint erroneously listed the charge as a misdemeanor, and that the minutes were amended for correction to be aligned with the filed felony complaint. The complaint and warrant, both dated in June 1995, both show the charge to be a felony.
>
> FN. It does appear that the complaint listed the priors in one location as having been convictions of Penal Code § 311.4 and in another location as having been convictions of Penal Code § 288: The complaint correctly listed the case numbers for the prior cases, and in those cases petitioner was clearly convicted of Penal Code § 288 charges. The priors were corrected in the information to only list convictions of Penal Code § 288.

(Docket No. 14-30 at 8).

Having set forth the relevant facts, the superior court rejected the claim. In doing so, the superior court noted that no evidence suggested that "the complaint and warrant were falsified; rather, it appears that the minutes were erroneously entered into the record, presumably because a Penal Code § 647.6 charge is ordinarily a misdemeanor, and then corrected. Petitioner does not establish a malicious intent to prosecute." (Id.).

B. Federal Legal Standard and Analysis

A vindictive prosecution claim may arise if a prosecutor files additional charges solely to punish a defendant for exercising a constitutional or statutory right. United States v. Noushfar, 78 F.3d 1442, 1446 (9th Cir. 1996) (citing Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)). To establish a prima facie case of prosecutorial vindictiveness, a defendant must show direct evidence of actual vindictiveness or facts warranting the appearance of vindictiveness. Nunes v. Ramirez-Palmer, 485 F.3d 432, 441 (9th Cir. 2007). "[T]he defendant must make an initial showing that charges of increased severity were filed because the accused exercised a statutory, procedural, or constitutional right in circumstances that give rise to an appearance of vindictiveness." United States v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982).

Here, petitioner fails to describe any specific prosecutorial action that can be described as vindictive or malicious. Rather, he cites only what appears to be a clerical error in the trial court's minutes memorializing the filing of the complaint against petitioner. Although, citing those court

minutes, petitioner maintains that he was initially charged with a misdemeanor, he ignores the fact that the 1995 complaint and arrest warrant both show that he had been charged with a felony. What is more, the complaint also alleged that petitioner had previously been convicted of two prior felonies. Given this record, petitioner has not shown that the felony complaint against him was falsified or improper. Accordingly, he cannot establish any evidence of vindictiveness or maliciousness on the prosecutor's part.

The superior court's rejection of this ground for relief, therefore, was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

GROUND SEVEN: INEFFECTIVE ASSISTANCE OF COUNSEL

In his next ground for relief, petitioner contends that his trial counsel and his appellate counsel committed a series of errors that, alone or in combination, deprived petitioner of his right to effective assistance of counsel at trial and on appeal. (Docket No. 1 at 15; Docket No. 1-2 at 17-24).

The standards for assessing the performance of trial and appellate counsel are the same. Evitts v. Lucey, 469 U.S. 387, 395-99, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); Cockett v. Ray, 333 F.3d 938, 944 (9th Cir. 2003). As to each allegation of error, petitioner bears the burden of establishing both components of the standard set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the first prong of that test, the petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. Id. at 687-88. To establish deficient performance, the petitioner must show his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687; Williams, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In reviewing trial counsel's performance, however, courts "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). Only if counsel's acts and omissions, examined within

the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will petitioner meet this initial burden. Kimmelman v. Morrison, 477 U.S. 365, 386, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); Strickland, 466 U.S. at 690.

Under the second part of Strickland's two-prong test, the petitioner must show that he was prejudiced by demonstrating a reasonable probability that, but for his counsel's errors, the result would have been different. 466 U.S. at 694. The errors must not merely undermine confidence in the outcome of the trial or the appeal, but must result in a proceeding that was fundamentally unfair. Williams, 529 U.S. at 393 n.17; Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The petitioner must prove both deficient performance and prejudice. A court need not, however, determine whether counsel's performance was deficient before determining whether the petitioner suffered prejudice as the result of the alleged deficiencies. Strickland, 466 U.S. at 697.

Here, none of petitioner's allegations of attorney error warrants federal habeas relief. Each of those allegations is addressed in turn below.

A. Trial Counsel

Petitioner identifies a host of errors that trial counsel allegedly committed. (Docket No. 1-2 at 17-23). First, petitioner faults counsel for failing to argue that petitioner's arrest resulted in a Fourth Amendment violation, that his extradition from the Philippines was illegal, and that the applicable statute of limitations to prosecute him had expired before his arrest. (See, e.g., id. at 18-23). Underlying each of these allegations is petitioner's contention that the felony complaint used to justify his arrest and extradition was invalid.[13] The invalid felony complaint was only

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[13] (See, e.g., Docket No. 1-2 at 18 ("[T]his misdemeanor document is the only possible document the U.S. Marshals could have used to extradite [petitioner]. This is insufficient to claim after 20 years. But the [trial counsel] does nothing"); id. at 19 ("Counsel failed to litigate in any way [petitioner's] 4th Amendment protections to Due Process from improper arrest procedures where there was no warrant at all or at the least this expired misdemeanor warrant improperly issued, now changed to a felony 20 years later.") (citation omitted); id. (alleging that counsel "failed to raise the [statute of limitations] defense on a clear 4th Amendment violation time barring jurisdiction of the Orange County Court or U.S. Marshals to extradite where there was no authority to do so. Warrant expired and destroyed."); id. at 20 (complaining that counsel "did not pursue (continued...)

issued, according to petitioner, because the statute of limitations to convict petitioner of misdemeanor child molestation -- the crime with which he was originally charged -- had expired. (See id.).

Second, petitioner complains that counsel erred in failing to object to Elizabeth's testimony about one the facts underlying one of petitioner's prior molestation convictions. (Id. at 20). In this allegation of error, petitioner does not challenge the admissibility of the prior crime evidence; rather, he faults counsel for failing to object to Elizabeth's testimony about the prior crime because, according to petitioner, her testimony described conduct that was worse than the crime to which petitioner pleaded guilty in that case. (See id.). In 1981, petitioner pleaded guilty to committing lewd and lascivious touching of Elizabeth. (See supra). But, according to petitioner, Elizabeth's trial testimony implied that he raped her and threatened to harm her younger sister if she told anyone about what he had done. (Docket No. 1-2 at 20). As such, according to petitioner, counsel should have objected to Elizabeth's trial testimony or moved to strike her testimony regarding the purportedly prejudicial details of the prior crime. (See Docket No. 1-2 at 20).

Third, petitioner contends that counsel erred in failing to attempt to discredit the victims from petitioner's prior molestation convictions. (See Docket No. 1-2 at 21-22). For example, petitioner faults counsel for opting against cross-examining the victims. (See id. at 21-22 ("Counsel failed to cross-examine 35 years on, prior act, 1108 witnesses to specific allegations. . . ."). In addition, petitioner asserts that counsel should have "obtain[ed] reliable witnesses and develop[ed] obvious *exculpatory facts lost overtime through 'somewhat cryptic' police reports.*" (Id. at 22 (emphasis in original)).

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[13](...continued)
a [statute of limitations] defense having no knowledge of the contrivancy [sic] at [petitioner's] arraignment which had been covered up by the time [counsel] took the case. Nor did she have any connection to the fact the charging documents had been 'corrected' now to a felony."); id. at 23 ("Counsel failed to *question* these charging documents arising out of the arraignment without any knowledge of a *cover-up* and now *fraudulent* arrest procedure. The original warrant # is not seen on any other document.") (emphasis in original)).

1. The Orange County Superior Court's Opinion

The Orange County Superior Court rejected petitioner's allegations of trial counsel error. In doing so, the superior court set forth the relevant legal standard governing ineffective assistance of counsel claims. Specifically, the superior court stated:

> To establish a claim of incompetence of counsel, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. An ineffective assistance of counsel claim fails on an insufficient showing of either element.

(Docket No. 14-30 at 5). Moreover, the superior court noted that, generally, reviewing courts are prohibited from second-guessing counsel's trial tactics and strategic decisions. (Id. at 6 (citing Richter, 562 U.S. at 89; Strickland, 466 U.S. at 689)).

Having set forth the relevant legal standard, the superior court rejected petitioner's allegations of trial counsel error, stating:

> Petitioner first claims that the deputy public defender representing him at his arraignment failed to adequately raise a Fourth Amendment claim. He fails to state how raising Fourth Amendment claim in state court when the arrest happened in the Philippines is deficient representation. He also argues that there was a statute of limitations defense that his public defender should have raised at that point, but it appears from the available record that the charges were timely filed. Additionally, a subsequent deputy public defender made an appropriate speedy trial motion. Petitioner also states that the subsequent deputy public defender made several mistakes, such as failing to cross-examine the Evidence Code § 1108 witnesses, to investigate prior accusations, to obtain reliable witnesses, to raise a statute of limitations defense, and to raise issues with the charging documents. Petitioner's claims are largely conclusory, and he does not provide an adequate record or legal support from which the court can determine that his attorneys' performance was substandard. Petitioner has also not established how he was prejudiced by the allegedly deficient representation.

(Id.).

2. Analysis

In rejecting petitioner's ineffective assistance of trial counsel claims, the superior court applied the proper legal standard for analyzing such claims. (See id. at 5-6 (supra)). Accordingly, the superior court's resolution of petitioner's claims was not contrary to the Supreme Court's clearly established precedents. Petitioner, therefore, cannot obtain habeas relief on this ground for relief unless he can show that the superior court unreasonably applied the Supreme Court's clearly established precedent -- that is, he must show that the superior court unreasonably applied

the governing legal standard to the facts of his case. See Penry v. Johnson, 532 U.S. 782, 792, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001).[14] As explained below, petitioner cannot make that showing with regard to any of his ineffective assistance of trial counsel claims.

First, there is no merit to any of petitioner's allegations of error that are premised on his contention that the felony complaint used to justify his arrest and extradition was invalid. As explained in connection with petitioner's vindictive prosecution claim, the 1995 complaint and arrest warrant both show that petitioner was charged with a felony. (See supra). At most, petitioner has identified a clerical error in the trial court's minutes memorializing the filing of the complaint against petitioner. But this obvious clerical error, which was corrected, is nowhere near sufficient to show that the felony complaint against him was falsified or improper. Accordingly, petitioner cannot show that trial counsel was ineffective in failing to challenge the felony complaint (or that petitioner suffered prejudice), as any such challenge was doomed to fail. See Morrison, 477 U.S. at 375; Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) (counsel's failure to raise meritless argument does not constitute ineffective assistance).

Second, assuming error, petitioner cannot show any prejudice arising from counsel's failure to object to, or his failure to move to strike, the testimony of Elizabeth regarding petitioner's prior conviction. Although petitioner complains that her testimony described conduct that was worse than that to which he pleaded guilty in connection with that case, there is little reason to believe that, had counsel objected, the trial court would have limited Elizabeth's testimony. Indeed, that testimony was relevant to petitioner's motive in the instant case and was necessary to understand the crime that petitioner committed. Putting that aside, there is no reason to believe that the jury would have reached a verdict other than the one it reached even if the trial court had curtailed Elizabeth's testimony about the prior crime. Petitioner pleaded guilty to committing a lewd and lascivious act against Elizabeth. Under California law, that guilty plea meant that petitioner admitted to "willfully and lewdly commit[ing] [a] lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of

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[14] The same is true as to petitioner's ineffective assistance of appellate counsel claims. (See infra).

arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person. . . ." Cal. Penal Code § 288. Accordingly, *any* details about the crime to which petitioner pleaded guilty -- not just those details with which petitioner takes issue -- were likely to strongly influence the jury's assessment of the victim's testimony in the instant case. After all, like Elizabeth, the victim in the instant case testified that, when she was merely eleven-years-old, petitioner committed sexual misconduct against her. And, petitioner was convicted of committing lewd and lascivious acts against Shannon A., yet another eleven-year girl. More importantly, as in the instant case, some of the misconduct that petitioner committed in connection with his crime against Shannon A. involved photography.[15] Given the fact that the jury was apprised of petitioner's history of molesting children and the fact that his current crime involved the same or similar conduct, there is no reason to believe that, but for counsel's failure to object to aspects of Elizabeth's testimony, the jury would have reached a verdict more favorable to petitioner than the one it reached.[16]

Third, petitioner is not entitled to habeas relief with respect to his claim that counsel erred in failing to attempt to discredit the victims from petitioner's prior molestation convictions. Although petitioner faults counsel for declining to cross-examine the victims in those cases, he points to no line of inquiry that counsel could have pursued that would have benefitted petitioner's defense. Moreover, counsel may have had a strategic reason to forego cross-examining the victims. Indeed, it was unlikely that counsel could have discredited the victims' testimony because petitioner in fact pleaded guilty to committing lewd and lascivious acts against both victims. What is more, the only witness who could have contradicted the victims' accounts would have been petitioner himself. Petitioner, however, elected not to testify. And, to the extent that counsel may

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[15] Although petitioner's misconduct against Shannon A. involved photography, it also included physical misconduct -- namely, petitioner had eleven-year-old Shannon A. and her female friend sit on his lap while he had an erection. Petitioner also invited Shannon A. to his house, but Shannon A. refused his invitation.

[16] Although by no means dispositive, it is noteworthy that, in arguing that the prior crimes evidence should be excluded, trial counsel acknowledged that the jury would convict petitioner of the charged crime of child molestation if it learned that petitioner already had been convicted of committing sexual misconduct against girls under fourteen years of age. (See Reporter's Transcript ("RT") 127).

have advised petitioner not to testify, that advice was reasonable, considering that testifying would have exposed petitioner to a blistering cross-examination. Indeed, had he testified, petitioner would have been cross-examined about committing the prior crimes and the details of those crimes. He would also have been cross-examined not only about the allegations underlying the instant crime, but also about his efforts to dissuade people from reporting his conduct to police and his decision to leave the country without letting anyone know that he would be gone for years. Given the risk of exposing petitioner to these lines of questioning, petitioner would have been well-advised to not testify, particularly since there is no reason to believe that the jury would have accepted petitioner's account over that of his victims regarding crimes to which he already had pleaded guilty.

Finally, petitioner's claim that counsel should have identified and called "reliable witnesses"[17] to present exculpatory testimony regarding the police reports generated in connection with his prior convictions fails for lack of evidence. Petitioner provides nothing in the form of a declaration or affidavit from any such witness stating that he or she was willing to testify or identifying the facts to which he or she would have testified. See Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting ineffective assistance of counsel claim based on failure to call witnesses where petitioner presented no affidavit from witness showing that witness was willing to provide helpful testimony to petitioner). Indeed, petitioner does not even identify which witnesses counsel should have called to testify.

B. Appellate Counsel

Petitioner contends that appellate counsel deprived petitioner of his right to effective assistance of counsel on appeal. (See Docket No. 1-2 at 23-24). Specifically, petitioner maintains that appellate counsel erred in presenting an inaccurate account of the facts that were presented at trial. (See id. at 23).[18] Additionally, petitioner faults appellate counsel for failing to argue that

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[17] (Docket No. 1-2 at 22).

[18] (Docket No. 1-2 at 23) ("Counsel used an inaccurate determination of the facts which resulted in an inadequate showing of prejudice by the Court of Appeal. i.e. There was no (continued...)

petitioner's arrest resulted in a Fourth Amendment violation and that his extradition from the Philippines was illegal. (Id. at 23-24). In connection with that contention, petitioner contends that counsel erred in failing to argue that the trial court lacked jurisdiction to prosecute petitioner because the statute of limitations on the crime underlying his conviction already had expired before he was arrested. (Id. at 24). Finally, petitioner faults counsel for failing to assert a claim of actual innocence. (Id.).

1. The Orange County Superior Court's Opinion

Petitioner asserted his allegations of error on appellate counsel's part in the habeas petition that he filed in the Orange County Superior Court. (Docket No. 14-29). The superior court rejected petitioner's allegations, stating:

> Petitioner does not provide a copy of the appellate briefs, so it is unclear what the arguments on appeal were. Even if counsel had failed to raise the issues in this petition, it would be reasonable for appellate counsel to conclude that the arguments propounded by petitioner here would be unsuccessful and therefore not worth arguing. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on, a few key issues." (Jones v. Barnes (1983) 463 U.S. 745, 751-752). "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts -- often to as little as 15 minutes -- and when page limits on briefs are widely imposed. [Citations.]" (Id. at pp. 752-753). "[T]he role of the advocate "requires that he support his client's appeal to the best of his ability' . . . For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the[] goal of vigorous and effective advocacy . . . ." (Id. at p. 754). Petitioner has also failed to establish how the result of the proceeding would be different had appellate counsel not committed the alleged errors.

(Docket No. 14-30 at 7-8).

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[18](...continued)
previous visit to [the victim's mother's apartment; the disposition of the film -- [the victim's mother] picked it up and gave it to the police; [the victim's mother] never directly talked to [petitioner] on the phone; The party was near midnight; cold and dark; the photo developer gave the photos to [the victim's mother] with Minch's authority. . . .").

2. Analysis

Petitioner's allegations of attorney error on the part of appellate counsel are meritless. As discussed above, petitioner's claims regarding his arrest and extradition, as well as the trial court's jurisdiction, fail because they are premised on, at most, a clerical error in the trial court's minutes memorializing the filing of the complaint against petitioner. (See supra). Petitioner's claim that appellate counsel presented an inaccurate account of the relevant facts is equally meritless. Presumably, petitioner is challenging the statement of facts that counsel presented in the direct appeal that he filed on petitioner's behalf. A review of those facts, however, shows only that counsel accurately summarized "[t]he facts presented by the prosecution at trial," and that he followed that summary with "[t]he facts presented by the defense at trial." (Docket No. 14-17 at 11-19). Although petitioner may take issue with the testimony presented by the prosecution, counsel did not perform deficiently in faithfully summarizing those facts. Indeed, had he done otherwise, he would have lost credibility with the reviewing court. Finally, counsel did not preform deficiently in failing to assert an actual innocence claim. Although petitioner maintains his innocence, he points to no evidence showing that he was actually innocent. Such conclusory, unsupported allegations do not warrant habeas relief. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995) (habeas relief not warranted where claims for relief are unsupported by facts). What is more, as explained in connection with petitioner's first ground for relief, there was ample evidence presented at trial proving petitioner's guilt. (See supra).

Accordingly, the superior court's rejection of petitioner's allegations of attorney error was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. Accordingly, petitioner is not entitled to habeas relief with respect to this ground for relief.

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GROUND EIGHT: CUMULATIVE ERROR

In his next ground for relief, petitioner asserts that the cumulative impact of the foregoing trial errors violated his constitutional rights. (See Docket No. 1 at 11). The Ninth Circuit has held that the Supreme Court has "clearly established" that the cumulative effect of multiple trial-type constitutional errors may render a defendant's trial constitutionally infirm even if the errors, considered individually, are not considered harmful. Parle v. Runnels, 505 F.3d 922, 927-28 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284, 298, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). To justify habeas relief, the cumulative impact of multiple errors -- judged "harmless" when viewed individually -- must "render[ ] the resulting criminal trial fundamentally unfair." Id. at 927; see United States v. Toles, 297 F.3d 959, 972 (10th Cir. 2002) ("A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they [are not] harmless.").

Here, none of petitioner's claims has merit. Thus, the collective impact of the purported errors underlying those claims could not have rendered petitioner's trial fundamentally unfair. Although the Court has, in the alternative, recommended rejection of some of the foregoing grounds for lack of prejudice, the collective prejudice from the purported errors underlying those grounds did not render petitioner's trial fundamentally unfair. Consequently, habeas relief is unwarranted on this claim.[19]

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[19] In connection with his cumulative error claim, petitioner contends that the trial court "committed the most egregious single error standing alone and a fatal miscarriage of justice by allowing 1108 evidence to be heard." (Docket No. 1-2 at 1). Presumably, petitioner's reference to "1108 evidence" pertains to the evidence regarding his prior molestation convictions. If so, that claim fails for four reasons. First, it involves only a state law claim of error and, therefore, is not cognizable. 28 U.S.C. § 2254(a); McGuire, 502 U.S. at 67-68. Second, on direct review, the California Court of Appeal held that the evidence of the prior molestation convictions was properly admitted under California law. (Docket No. 14-16 at 15-19). This Court is bound by that holding. See Bradshaw, 546 U.S. at 76 (supra). Third, the court of appeal's rejection of this claim was not unreasonable or contrary to federal law as determined by the Supreme Court because the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009). Fourth, evidence that petitioner had twice been convicted of child molestation was relevant to show petitioner's motive in exposing himself to the victim in the instant case. See Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); see (continued...)

GROUND NINE: CRUEL AND UNUSUAL PUNISHMENT

In his next ground for relief, petitioner contends that his sentence of twenty-five-years-to-life violates the Eighth Amendment's ban on cruel and unusual punishment. (Docket No. 1 at 19). According to petitioner, his sentence runs afoul of the Eighth Amendment because the conduct of which he was accused supported only a misdemeanor conviction, not a felony conviction. (Id.). In connection with this ground for relief, petitioner, again, complains that he was prejudiced by the nearly twenty-year delay between the crime and his arrest. (Id.). Presumably, petitioner believes that imposing a life sentence in the face of such a prolonged delay violates the Eighth Amendment. (Id.). As explained below, this ground for relief is meritless.[20]

The Eighth Amendment, which forbids cruel and unusual punishments, contains a narrow proportionality principle that applies to non-capital sentences. Ewing v. California, 538 U.S. 11, 20, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003). In non-capital cases, the Eighth Amendment prohibits only extreme sentences that are "grossly disproportionate" to the severity of the crime. Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring); see also Andrade, 538 U.S. at 72 ("A gross disproportionality principle is applicable to sentences for terms of years."). As a result, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." Rummel v. Estelle, 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980); see also Harmelin, 501 U.S. 957 (upholding sentence of life without possibility of parole for possession of 672 grams of cocaine); Andrade, 538 U.S. at 77 (finding that California courts did not unreasonably apply clearly established federal law in affirming sentence of two consecutive terms of twenty-five-years-to-life in prison under California's "Three Strikes" law for petty theft with a prior

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[19](...continued)
McGuire, 502 U.S. at 70 (testimony does not violate due process if it is relevant).

[20] Although petitioner presented this ground for relief in the habeas petition that he filed in the Orange County Superior Court, it does not appear that the superior court (and, as a result, the California Court of Appeal and the California Supreme Court) actually addressed it. Consequently, the Court reviews this ground for relief under the de novo standard of review.

petty theft conviction); Andrade, 538 U.S. at 77 ("The gross disproportionality principle reserves a constitutional violation for only the extraordinary case.").

Here, petitioner's sentence does not fit within the exceedingly rare or extreme types of sentences that violate the Eighth Amendment. Petitioner was convicted of felony child molestation. Although petitioner argues that the acts underlying his conviction are "far less serious than most offenses involving child victims" in that no one was "touched, hurt, injured, threatened, or harmed,"[21] his crime, nevertheless, was a serious one. Moreover, although the victim was not physically harmed, it is, at a minimum, debatable whether the victim, as petitioner contends, was not otherwise "hurt," "injured," or "harmed" by petitioner's actions. Regardless, petitioner's life sentence not only took into account the gravity of his current crime, but also encompassed his prior criminal record. It is well established that legislatures may punish recidivists more severely than first-time offenders. Rummel, 445 U.S. at 276 (upholding life sentence imposed under recidivist statute where three felonies consisted of passing forged $28.36 check, fraudulently using credit card to obtain $80.00 worth of goods or services, and obtaining $120.75 by false pretenses). Here, petitioner's criminal record included two prior felony convictions for child molestation -- that is, crimes similar to the one at issue in the instant case. The gravity and seriousness of petitioner's current and prior crimes far outweigh those that triggered the constitutionally permissible life sentence in Rummel.

In short, petitioner has failed to show that his sentence was grossly disproportionate to the crimes of which he was convicted. He is, therefore, not entitled to habeas relief with respect to this ground for relief.[22]

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[21] (Docket No. 1-2 at 58).

[22] To the extent petitioner believes that his Eighth Amendment rights were violated due to the delay between the crime and his arrest, that claim fails because it does not implicate the Eighth Amendment. Rather, as explained in connection with petitioner's speedy trial claim, the delay between the crime and his arrest implicates only petitioner's right to due process. And, as explained above, petitioner suffered no due process violation in connection with the delay between the crime and his arrest. (See supra).

GROUND TEN: THE STATE COURTS' RESOLUTION OF PETITIONER'S STATE HABEAS PETITIONS

In his final ground for relief, petitioner contends that the state courts erred in denying his state court petitions for writ of habeas corpus without first conducting an evidentiary hearing. (Docket No. 1 at 20).

Habeas relief is not warranted with respect to this ground for relief because it is not cognizable on federal habeas review. Federal habeas relief is not available to redress errors in state post-conviction proceedings. Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam) (holding that "a petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings"); see also Cooper v. Neven, 641 F.3d 322, 331 (9th Cir. 2011) (due process claim challenging trial court's failure to conduct in camera inspection of file during post-conviction evidentiary hearing was not cognizable on federal habeas review); Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998) (claim alleging bias by post-conviction relief judge was not cognizable in federal habeas proceeding). Instead, habeas relief is only available where the petitioner shows that his detention violates the United States Constitution, a federal statute, or a treaty. Franzen, 877 F.2d at 26; 28 U.S.C. § 2254(a). An attack on a petitioner's state post-conviction proceedings "is an attack on a proceeding collateral to the detention and not the detention itself." Nicholas v. Scott, 69 F.3d 1255, 1275 (5th Cir. 1995) (citation omitted). Thus, although the federal claims that petitioner presented in his various state habeas petitions may be cognizable in this action, the manner in which the state courts resolved those claims does not constitute a separate basis for habeas relief.

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RECOMMENDATION

It is recommended that the District Judge issue an Order: (1) accepting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

Paul L. Abrams

Dated: July 3, 2019

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE